Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	Transmittal Nos. 873, 874, 893, 909, 910
GTE Telephone Operating Companies	)	CC Docket No. 94-81
	)	
Revisions to Tariff F.C.C. No. 1	)	

MOTION OF GTE CALIFORNIA INCORPORATED FOR DECLARATORY RULING

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SUMMARY

On January 24, 1995, Apollo filed a complaint against GTECA in California state court alleging that GTECA's tariffing of the Cerritos video network constituted (1) a breach of the implied covenant of good faith and fair dealing, and (2) interference with Apollo's business relationships. As redress, Apollo seeks damages, *i.e.*, the purported difference between the rates stated in GTECA's tariffs now in effect (albeit subject to investigation) and the pre-existing private contract rates. The state court has refused to stay Apollo's action until the Commission has completed its investigation of GTECA's Cerritos tariffs. Apollo is therefore proceeding to prosecute this action against GTECA despite the effectiveness of the tariffs on file. Apollo has further refused to pay the tariffed rates since expiration of the waiver.

This state court action seriously undermines the Commission's Title II jurisdiction and the federal regulatory scheme. The relief requested in Apollo's complaint clearly violates Section 203 of the Act. Specifically, Apollo would be required to pay the tariffed rate for GTECA's common carrier transport of its video signals and then receive a rebate from GTECA in the form of contract or tort damages. This result is precisely of the type which Section 203 forbids. *E.g.*, *Maislin Industries v. Primary Steel*, 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed 2d 94 (1990); *Marco Supply Co., Inc. v. AT&T*, 875 F.2d 434 (4th Cir. 1989). Indeed, the insidiousness of Apollo's action is readily apparent. Were Apollo to succeed, any Title II common carrier could enter into private contracts with customers at other than the tariffed rate, and then effectuate a rebate or preference by sustaining a state court judgment on a breach of contract or tort theory.

Despite Apollo's contentions before the state court, the Commission not only has the authority, but an absolute duty, to enforce the provisions of Title II, including a determination that Apollo's request for damages constitutes an unlawful preference or rebate in violation of Section 203. GTECA therefore respectfully seeks a declaration from the Commission that Apollo's requested relief for damages in its state court action violates the strict provisions of Title II governing rate regulation between common carrier and customer.

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Pursuant to Section 5(d) of the Administrative Procedure Act and Section 1.2 of the Commission's Rules, GTE California Incorporated (GTECA) respectfully seeks a declaratory ruling by the Commission that the relief requested by Apollo CableVision, Inc. (Apollo) as damages in its First Amended and Supplemental Complaint filed in the Superior Court of the State of California, County of Ventura (*Apollo CableVision, Inc. v. GTE California Incorporated et al.*, CIV 142800), constitutes a preference or rebate in violation of Section 203 of the Communications Act of 1934, as amended (Communications Act).

I. FACTS AND PROCEDURAL HISTORY.

The history of GTECA's Cerritos video network is set forth in some detail in the Commission's July 14, 1994 Order, attached hereto as Exhibit A. For the Commission's convenience, GTECA briefly summarizes the facts relevant to this motion below.

A. The Parties' Contracts.

In 1987, the City of Cerritos (the City), Apollo and GTECA entered into a number of private agreements pertaining to the construction, lease and maintenance of a video network in Cerritos, California. Under a lease agreement with Apollo, GTECA agreed to lease to Apollo 39 channels of bandwidth on the network necessary to transport

Apollo's video signals to the residents of Cerritos. *See* Ex. B, Apollo Lease Agreement attached hereto. GTECA also entered into a coordinate fifteen year lease with its affiliate, GTE Service Corp. (Service Corp.), agreeing to transport Service Corp.'s video signal on the other 39 channels of bandwidth. In a June 26, 1989 amendment to the Apollo lease, GTECA agreed that in the event any of the 39 channels leased by Service Corp. became available prior to the end of Service Corp.'s 15 year lease (hereafter, excess bandwidth), Apollo would have a right of first refusal to lease such excess bandwidth. Apollo Lease Agreement, Amendment No. 2, ¶ 8, modifying Apollo Lease Agreement ¶ 21(a).

Although Apollo, GTECA and the City agreed that GTECA was leasing the bandwidth capacity to Apollo on a private basis, the parties also agreed that if the Commission should "claim Title II jurisdiction over the service provided by [GTECA], [Apollo] shall be subject to the rates, terms and conditions such agency may impose." Apollo Lease Agreement, ¶ 19.

B. Involvement of the Commission.

Shortly after execution of these private agreements, GTECA filed for authority under Section 214 of the Communications Act to construct, operate and maintain the coaxial video transport facilities required under the two lease agreements. In response to GTECA's application, the Commission asserted Title II jurisdiction over the private contractual relationships existing by and among GTECA, Apollo, Service Corp. and the City. *See In re General Telephone Company of California*, 4 FCC Rcd 5693 (1989) (*Cerritos Order*); *In re General Telephone Company of California*, 3 FCC Rcd 2317 (Common Carrier Bureau, 1988). By asserting Title II jurisdiction, the Commission found that the GTECA/Apollo relationship was governed by the express provisions of

the Communications Act, notwithstanding the parties' private contracts and contentions to the contrary. In connection with its assertion of Title II jurisdiction, the Commission also concluded that the private contractual relationship among the parties violated the statutory video programming ban (47 U.S.C. § 533(b)) and the Commission's implementing regulations (47 C.F.R. § 63.54(c)) but granted GTECA a five year "good cause" waiver under 47 U.S.C. § 533(b)(4) and 47 C.F.R. § 63.56(a).

Facing expiration of the good cause waiver on July 17, 1994, GTECA filed tariffs governing the future use of its video network on April 22, 1994: Transmittal No. 873 for the provision of video channel service to Apollo, and Transmittal No. 874 for the provision of video channel service to Service Corp. On July 14, 1994, the Commission suspended Transmittal No. 873[1] for one day, permitted the tariff to go into effect on July 18, 1994 and instituted an investigation of it, designating, among other issues, the reasonableness of GTECA's rates and terms. The Commission also directed further briefing on the issue of whether GTECA's tariff is lawful insofar as it operates to supersede contracts with Apollo. While under investigation, the tariff remains effective.[2]

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[1] Transmittal No. 873 was modified effective July 18, 1994 by Transmittal No. 893. Transmittal No. 893 is the tariff currently in effect for Apollo.

[2] In the same order, the Commission rejected Transmittal No. 874 as unlawful. However, in response to a motion for stay, the United States Court of Appeals for the Ninth Circuit stayed this portion of the July 14, 1994 Order, causing GTECA to file a new Transmittal No. 909. (Transmittal No. 909 reinstated the terms of former Transmittal No. 874 which GTECA had removed in response to the Commission July 14, 1994 rejection of this tariff.) In response, on September 9, 1994, the Commission issued a new order, suspending Transmittal No. 909 for one day, allowing it to go into effect on September 12, 1994 and instituting an investigation of it. Consequently, Service Corp. continues to lease the 39 channels which make up Apollo's claimed "excess bandwidth" in accordance with this tariff at the rate specified in this tariff.

C. Judicial Proceedings.

In April 1994, Apollo filed a complaint in the Ventura County Superior Court as a suit for declaratory relief under California state law. Cal. Code Civ. Proc. § 1060. This action was removed to federal court and subsequently remanded.

On or about January 24, 1995, Apollo filed its First Amended and Supplemental Complaint (Complaint) which alleges in its First Cause of Action, *inter alia*, that GTECA breached the implied covenant of good faith and fair dealing by "failing and refusing to rent the excess capacity on the coaxial cable that became available in or about July 1994 at the reasonable market rent for such excess capacity." Complaint, at ¶ 21, attached hereto as Ex. C. In similar fashion, in its Second Cause of Action, Apollo alleges that GTECA interfered with Apollo's relationship with its "present and future customers in Cerritos" by "prevent[ing] [Apollo] from offering a full 78 channel cable television service." Complaint, at ¶ 27. Finally, in its Third Cause of Action, Apollo alleges that "bandwidth capacity in the coaxial facilities in excess of 275 MHz has become available and [Apollo] is entitled to use that increase in capacity at a reasonable market rate . . . and that the sum of $95,265.00 per month is a figure substantially and materially in excess of the reasonable market rent for excess bandwidth." Complaint, at ¶ 34.

Accordingly, Apollo seeks both damages for breach of contract and interference with business relationships and a judicial declaration that excess bandwidth has become available and that Apollo is entitled to use the excess bandwidth at some still unstated reasonable market rate. Complaint, p. 14, ¶¶ 1, 2.

D. GTECA's Request For Declaratory Ruling.

Apollo's requested relief for damages constitutes an unlawful preference or rebate under Section 203 of the Communications Act. Under the long established filed rate doctrine, Apollo is forbidden from recovering damages since the terms of the filed tariff, unless and until suspended or rejected, govern its customer-carrier relationship with GTECA. Any variance from the tariffs now in effect (albeit subject to investigation) would result in unjust discrimination, the very evil which Congress sought to prohibit when it enacted the mandatory tariff provisions of both the original Interstate Commerce Act, and its successor for communications purposes, the Communications Act.

Consequently, a controversy has arisen. Pursuant to 47 C.F.R. § 1.2, GTECA seeks a declaration from the Commission to remove any uncertainty that Apollo's request for damages in its state court action violates the stringent rate regulations of Title II of the Communications Act.

II. UNDER THE FILED RATE DOCTRINE, APOLLO IS PRECLUDED FROM RECOVERING CONTRACT DAMAGES SIMPLY BECAUSE THE LEASE RATE UNDER GTECA'S FILED TARIFF MAY BE HIGHER THAN THE RATE WHICH WOULD HAVE BEEN ENJOYED UNDER THE CONTRACT.

A. Apollo's Requested Relief for Damages Arising Out Of An Alleged Breach of Contract Violates Section 203(c) Of The Act In That It Operates As An Unlawful Preference or Rebate.

Aside from Apollo's tired assertion that the provision of video signal transport by GTECA constitutes private carriage, Apollo concedes that GTECA was required to file a tariff for the continued provision of service once the Commission's good cause waiver expired on July 17, 1994. *See* Apollo Opposition to Direct Case, September 15, 1994, at 9, n.7 ("Apollo does not argue here that a tariff must not be filed."). Indeed, in light of

the Supreme Court's holding in *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, there can be no question that GTECA may, absent a waiver, provide video signal transport -- a common carriage service -- only in accordance with a properly filed tariff. *See also Southwestern Bell Corp. v. F.C.C.*, 1995 U.S.App.LEXIS 1071 (Jan. 20, 1995).[3]

In its Complaint, Apollo alleges in the First Cause of Action that GTECA breached the implied covenant of good faith and fair dealing by "failing and refusing to rent the excess capacity on the coaxial cable that became available in or about July 1994 at the reasonable market rent for such excess capacity." Complaint, at ¶ 21. Apollo further alleges that "bandwidth capacity in the coaxial facilities in excess of 275 MHz has become available and [Apollo] is entitled to use that increase in capacity at a reasonable market rate . . . and that the sum of $95,265.00 per month is a figure substantially and materially in excess of the reasonable market rent for excess bandwidth." Complaint, at ¶ 34. As redress, Apollo seeks damages for breach of contract and a judicial declaration that both the excess bandwidth has become available and that Apollo is entitled to use that increase in capacity at some unstated reasonable market rate. Complaint, at p. 14, ¶¶ 1, 2.

Although asserted somewhat more obtusely, Apollo's Second Cause of Action also demands damages based upon GTECA's "prevent[ing] [Apollo] from offering a full

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[3] Of course, the Commission's own rules have long made clear that the transport of video signals by a common carrier -- such as GTECA -- for a customer -- such as Apollo -- may be made only pursuant to tariff. *In re Public Broadcasting Service*, 39 Rad.Reg. (P&F) 1516 (1977); *In re Midwestern Relay Co.*, 59 FCC 2d 477 (1976), *recon. denied*, 69 FCC 2d 409 (1978), *aff'd sub nom. American Broadcasting Co. v. F.C.C.*, 643 F.2d 818 (D.C.Cir. 1980); *In re United Video, Inc.*, 49 FCC 2d 878 (1974), *recon. denied*, 55 FCC 2d 516 (1975); *In re General Telephone Co. of California*, 13 FCC 2d 448 (1968).

78 channel cable television service" by the filing of the video channel service tariffs for Apollo and Service Corp. upon expiration of the waiver on July 17, 1994. Complaint, at ¶ 27. As redress, Apollo seeks damages for interference with business relationships. Complaint, at p. 14, ¶ 2.

Notwithstanding Apollo's allegations, the Commission determined in its 1988 and 1989 Orders that upon expiration of the waiver, GTECA's Cerritos video network would be fully subject to the express provisions of the Communications Act, including Section 203(a) and 203(c), the mandatory, non-discriminatory filed rate provision. *See Cerritos Order*, 4 FCC Rcd 5693 (1989); *In re General Telephone Company of California*, 3 FCC Rcd 2317 (Common Carrier Bureau, 1988). In order to comply, GTECA necessarily had to file mandatory tariffs (to become effective July 18, 1994) that then would govern the terms and conditions of the common carrier-user relationship among GTECA, Apollo and Cerritos. On July 14, 1994, the Bureau suspended the tariff filed for Apollo, permitted it to go into effect on July 18, 1994 and instituted an investigation, designating, among other issues, the reasonableness of GTECA's rates and terms. However, unless and until the tariff is deemed unlawful by the Commission after the investigation, the terms of the tariff (now Transmittal No. 893) constitute the legal rates, terms and conditions between GTECA and Apollo. *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922).[4]

By its Complaint, Apollo seeks damages on account of GTECA's "unilaterally and voluntarily filing tariffs containing provisions contrary to [GTECA's] contracts with

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[4] Likewise, although GTECA's video channel service tariff for Service Corp. is also being investigated (Transmittal Nos. 909, 910), Service Corp. continues to lease the 39 channels (which comprises Apollo's claimed excess bandwidth) pursuant to the terms of the tariff presently in effect.

Apollo." Complaint, at ¶ 22. In particular, Apollo alleges that GTECA refused to offer Apollo use of the excess bandwidth which allegedly was to become available no later than July 1994 at the then reasonable market rent. Instead, according to Apollo, in October of 1993, GTECA offered Apollo the right to use the increased capacity only upon a rental rate of $95,265.00 per month, a figure which Apollo contends is not the reasonable market rate. Apollo further alleges that GTECA subsequently "voluntarily filed tariffs with the Federal Communications Commission," the terms of which altered the contractual relationship between Apollo and GTECA. Complaint, at ¶ 21. As a result, Apollo seeks monetary compensation.

In addition, Apollo requests a judicial declaration that bandwidth has become available and that Apollo has a valid contractual right to lease the excess bandwidth at some hitherto unstated reasonable market rent, but for which $95,265.00 is too much. Complaint, at ¶¶ 34-35. However, in recent pleadings, Apollo now alleged that a contractual right to lease the excess bandwidth capacity at a reasonable market had already accrued as of October 18, 1993. *See* Apollo's Opposition to GTECA's Motion for Judgment of the Pleadings, at 4, attached hereto as Ex. D. Thus, since the alleged harm has already occurred, Apollo is not entitled to declaratory relief, but rather its appropriate prayer would be for contract damages resulting from its alleged loss, *i.e.*, the difference between the private lease rate (determined by the then reasonable market rent) and the mandatory filed tariff rate (submitted by GTECA and currently being investigated by the Commission). *E.g., Cardellini v. Casey*, 181 Cal.App.3d 389, 397 (1986); *Baldwin v. Marina City Properties, Inc.*, 79 Cal.App.3d 393, 407 (1978).

Were Apollo to obtain the state court relief that it seeks, Section 203 of the Communications Act would be violated. In essence, Apollo would pay the filed tariff

rate for the lease of the excess bandwidth with one hand, and then receive a rebate from GTECA in the form of damages with the other hand. This transaction, placing Apollo in the position it occupied prior to expiration of the waiver and the effectiveness of the two tariffs, would clearly constitute the type of unlawful preference that Section 203 precisely sought to forbid. Indeed, allowing receipt of such damages would wholly undermine the policy and purpose underlying the non-discriminatory rate provision of Section 203.

The insidiousness of Apollo's claim is readily apparent. Were Apollo to succeed, any Title II common carrier could enter into private contracts with customers at other than the tariffed rate, and then effectuate a rebate by sustaining a state court judgment on a breach of contract theory. Because this would occur in a state judicial forum, the action would be outside of the Commission's regulatory scrutiny and that of the public. If the state court here were to award damages to Apollo, and GTECA was required to satisfy such a judgment (as Apollo demands), this result would not only allow but incent carrier-customer transactions to be governed by secretly negotiated rates, rather than publicly filed rates as mandated by the Communications Act.

B. The "Filed Rate" Doctrine Governs the Legal Relationship between Common Carrier and Customer.

The Supreme Court has long understood that the filed rate governs the legal relationship between common carrier and customer. *Maislin Industries v. Primary Steel*, 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed 2d 94 (1990). In *Keogh, supra*, the Court held that a customer could not recover damages against a rail carrier under antitrust laws simply because the rail freight rates published with the Interstate

Commerce Commission were higher than what it would have been charged otherwise. Justice Brandeis, writing for the Court, stated:

> "[T]he legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. . . .
>
> This stringent rule prevails, because otherwise the paramount purpose of Congress -- prevention of unjust discrimination -- might be defeated. If a shipper could recover . . . for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors."

Maislin, 497 U.S. at 126, citing *Keogh*, 260 U.S. at 162-63 (emphasis added). *See also Square D. Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed 2d 413 (1986) (reaffirming the vitality of *Keogh*'s filed rate rule despite the emergence of subsequent procedural and judicial developments).

Although the filed rate doctrine emerged pursuant to policies and purposes behind the rate provisions of the Interstate Commerce Act, its rationale is equally (if not more) applicable to the parallel provisions of Title II of the Communications Act, which borrowed its purpose and language from the Commerce Act. *See American Broadcasting Co., Inc. v. F.C.C.*, 643 F.2d 818, 820-21 (D.C. Cir. 1980) (to understand the Communications Act, courts must look to the Commerce Act); *MCI Telecommunications, Inc. v. F.C.C.*, 917 F.2d 30, 38 (D.C. Cir. 1990) (Communications Act based on Commerce Act and must be read in conjunction with it). In particular, the interpretation of Section 203 of the Communications Act (the mandatory non-discriminatory rate filing provision) finds support in judicial interpretations of the parallel

rate-filing provisions of the Interstate Commerce Act, 49 U.S.C. §§ 10761-10762 (1988). *Southwestern Bell Corp., supra*, 1995 WL 19336, at *7.

"Like the rate-filing provision of the ICA, section 203(a) is a central component of Congress's regulatory scheme for common carriers." *Southwestern Bell Corp.*, at *8. Specifically, Section 203(a) commands that "[e]very common carrier . . . shall file . . . schedules showing all charges." 47 U.S.C. § 203(a). Section 203(c), the overcharge and rebate provision, mandates that carriers shall charge only the filed rate, stating,

> "no carrier shall . . . (1) charge . . . a greater or less or different compensation . . . than the charges specified in the schedule then in effect, or (2) refund . . . any portion of the charges . . ., or (3) extend to any person any privileges . . . affecting such charges."

47 U.S.C. § 203(c). "The duty to file rates with the Commission, and the obligation to charge only those rates, have always been considered essential to preventing price discrimination and stabilizing rates." *MCI Telecommunications v. AT&T*, 114 S.Ct. at 2231, citing *Maislin Industries*, 497 U.S. at 126 (internal citations omitted). "[C]ompliance with these provisions is 'utterly central' to the administration of the Act." *Id.*, citing *Maislin Industries*, 497 U.S. at 132 and *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986).

In *Marco Supply Company, Inc. v. AT&T*, 875 F.2d 434 (4th Cir. 1989), the Court of Appeals *dismissed a breach of contract claim* by a customer of a telecommunications carrier who alleged that he was quoted a lower rate than what was eventually charged under the filed tariff. The court held that:

> "a regulated carrier must charge the tariff rate established with the appropriate regulatory agency, even if it has quoted or charged a lower rate to its customer. [citations omitted] To do so otherwise would be giving a preference to and discriminating in favor of the customer in question."

Id., 875 F.2d at 436 (emphasis in original).[5]

Like the customers in *Keogh* and *Marco*, Apollo seeks judicial redress from the circumstance that the mandatory tariff rate for the lease of the excess bandwidth is allegedly higher than the rate which Apollo purportedly would have been enjoyed under the private lease agreements. However, also as in *Keogh* and *Marco*, Apollo is subject to the filed rate doctrine and is, therefore, forbidden from recovering damages from GTECA for breach of contract. "To do so otherwise would be giving a preference to and discriminating in favor of [Apollo]." *Marco Supply*, 875 F.2d at 436.

C. In Accordance With Its Duty to Enforce The Stringent Regulatory Provisions of Title II, The Commission Has Authority to Declare Apollo's Request for Damages To Be In Violation of Section 203.

Under Title II of the Communications Act, Congress granted the Commission broad authority to regulate the rates charged for communications services. *Southwestern Bell Corp.*, 1995 WL 19336, at *2. The rate filing provisions are utterly central to Title II's regulatory scheme, with Section 203(a) being at the center of the common carrier provisions. *Id.*, at *8, *9. "Compliance with section 203(a) is crucial to the effective enforcement of the reasonable and nondiscriminatory provisions." *Id.*, at *9. To ensure compliance, the Commission has a duty to "execute and enforce" these provisions. *Id.*, at *8.

In contrast, no such stringent regulation is found in Title III, which applies to radio and television broadcasters. *United States v. Radio Corporation of America*, 358 U.S.

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[5] The district court's decision in *MCI Telecommunications v. TCI Mail*, 772 F. Supp. 64 (D.R.I. 1991), declining to follow *Marco*'s holding as it pertained to the filed rate doctrine is pure *dicta* since recovery by the TCI customer was not precluded by the terms of the filed tariff in question. "By its own terms, the MCI Tariff does not limit MCI's liability if judicial or administrative proceedings establish that MCI committed "willful misconduct." *TCI Mail*, at 67 (emphasis added).

334, 79 S.Ct. 457, 3 L.Ed.2d 354 (1959). For example, in *Radio Corp.*, the Court held that although broadcasters are regulated, radio and television broadcasters

> "are not included in the definition of common carriers in § 3(h) of the Communications Act, 47 U.S.C. § 153(h), 47 U.S.C.A. § 153(h), as are telephone and telegraph companies. Thus the extensive controls, including rate regulation of Title II . do not apply."

Id., 358 U.S. at 348-49.

Since the field of broadcasting, unlike that of common-carriage, is one of free competition, the Commission's authority is often limited to regulation within the "public interest, convenience and necessity." *Id.*, at 351. Consequently, *Regents of Georgia v. Carroll*, 338 U.S. 586, 70 S.Ct. 370, 94 L.Ed. 363 (1950), which holds that the Commission does not have the authority *under its Title III jurisdiction* to determine the validity of contracts between licensees and third parties, has no applicability to the parties here which are subject to the stringent provisions of Title II regulating common carrier provision of service.[6]

Accordingly, despite Apollo's contentions in the state court proceedings, this Commission not only has the authority, but an absolute duty, to enforce the provisions

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[6] *Regents of Georgia* is also inapplicable for a variety of other reasons. *First*, *Regents* did not involve a contract for a regulated service nor a contractual parties which were otherwise subject to the Commission's jurisdiction. Here, the contracts at issue specifically involve GTECA's common carrier provision of video transport service and both GTECA and Apollo are subject to the Commission's regulatory authority. *Second*, when *Regents* was decided, the Commission's authority "centered around" its licensing powers (under Title III). The Court's view of this limitation was based largely on the Commission's then-lack of authority to issue cease and desist orders. Subsequently, Congress conferred such authority (47 U.S.C. § 312(b) (1964)) which correspondingly expanded the Commission power to "protect the regulatory scheme." *Buckeye Cablevision, Inc. v. F.C.C.*, 387 F.2d 220, 224 (D.C. Cir. 1967). *Third*, despite Apollo's contentions that the Commission may not "legally" adjudicate the parties' contractual disputes, the Commission has already exercised its jurisdiction and made these disputes specifically subject to the pending investigation.

of Title II, including a determination that Apollo's request for damages constitutes an unlawful preference or rebate in direct violation of Section 203.

III. CONCLUSION.

For the foregoing reasons, GTECA seeks a declaration from the Commission pursuant to 47 C.F.R. § 1.2 that Apollo's requested relief for damages in its state court action as set forth hereinabove constitutes an unlawful preference or rebate in violation of the strict provisions of Title II governing rate regulation between common carrier and customer.

Respectfully submitted,

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February 8, 1995

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ORDER

Adopted: July 14, 1994; Released: July 14, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On April 22, 1994, GTE Telephone Operating Companies (GTOC), on behalf of the General Telephone Company of California (GTECA), filed Transmittal No. 873 to establish video channel service for Apollo CableVision, Inc. (Apollo), a cable company providing cable service in Cerritos, California. On that same day, GTECA also filed Transmittal No. 874 to provide this same service to an affiliated company, GTE Service Corporation (Service Corp.). Four parties, Apollo, MCI Telecommunications Corporation (MCI), National Cable Television Association, Inc. (NCTA), and the City of Cerritos, California (the City), filed petitions to reject or suspend and investigate Transmittal 873 and/or 874.

2. GTE states that it has submitted these two tariff transmittals to enable Apollo and Service Corp. to continue providing cable service to Cerritos subscribers after the previous grants of Commission authority expire, on July 17, 1994.[1] As discussed below, we find that Transmittal 874 violates the Communications Act and our rules, and that Transmittal 873 raises serious questions that require further investigation. We, accordingly, take action on these tariffs to enforce the law while minimizing disruption of service to cable subscribers. Specifically, for reasons set forth below, we reject Transmittal 874. We advance the effective date of Transmittal 873 for one day, suspend Transmittal 873 for one day, impose an accounting order, and initiate an investigation. We also grant temporary extensions of regulatory approvals to permit GTECA to provide channel service to Apollo during the investigation and to Service Corp. for 60 days so that it can come into compliance with the telephone-cable cross-ownership restriction without abruptly terminating cable programming service to subscribers in Cerritos.

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[1] Transmittal No. 873, Description and Justification (D&J) at 1; Transmittal No. 874, Description and Justification (D&J) at 1.

II. BACKGROUND

3. In 1988, GTECA sought authority, pursuant to Section 214 of the Communications Act, as amended (Act), 47 U.S.C. § 214, to construct and maintain a 78-channel cable network in Cerritos, California. The intended customers of the service offering were Apollo Cablevision (Apollo), the cable franchisee in Cerritos, and Service Corp.[2] GTECA contracted with Apollo's parent company, T.L. Robak, Inc. (Robak), to construct the network. The Common Carrier Bureau (Bureau) found that the construction contract between GTECA and Robak would create a relationship between the two other than a "carrier-user relationship," and thus GTECA's proposal would violate the cable-telephone cross-ownership rules and the Cable Act of 1984.[3]

4. Because the City of Cerritos had concluded that no one other than GTECA had made an adequate response to the City's request for proposals to provide cable service in Cerritos, however, the Bureau found that video service "demonstrably could not exist" unless GTECA's proposal went forward.[4] Therefore, the Bureau found that GTECA had met the standard established in Section 63.56 of the Commission's Rules for waiver of the cross-ownership rules.[5] The Bureau granted GTECA a Section 214 authorization to construct and operate the Cerritos system, subject to a limited waiver of the cross-ownership rules.[6] Among other things, this waiver permitted Service Corp. to conduct tests using the network, but prohibited GTECA from allocating the costs associated with Service Corp.'s provision of cable service to regulated accounts.[7] The Bureau required GTECA to file annual reports regarding Service Corp.'s use of the network.[8] On review, the Commission also found that grant of a waiver of the cross-ownership rules was warranted, but imposed additional conditions, including limiting the waiver

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[2] General Telephone Company of California, 3 FCC Rcd 2317 (Com.Car.Bur. 1988) (Waiver Order).

[3] Id. at 2319 (para. 20). See Section 613(b)(1) of the Cable Act of 1984, 47 U.S.C. § 533(b)(1); Section 63.54 of the Commission's Rules, 47 C.F.R. § 63.54.

[4] Id. at 2322 (para. 35).

[5] Id. at 2323 (paras. 35-37).

[6] Id. at 2323 (para. 37).

[7] Id. at 2323 (paras. 39-41). Under its testing authority, Service Corp. has provided a near video on demand service it calls "Center Screen." See Letter from John F. Raposa, GTOC, to Acting Chief, Common Carrier Bureau (June 14, 1994).

[8] Id. at 2323 (para. 41).

to five years from the release date of the Order, which period is due to expire on July 17, 1994.[9]

5. NCTA sought judicial review of the Commission's decision to authorize the Cerritos system and to waive the cross-ownership rules. The Court found that there was good cause for grant of a waiver of the cross-ownership rules to permit Service Corp. to conduct the authorized tests, but remanded the case to the Commission because the Commission had not adequately explained why it was necessary for GTECA to hire Robak to construct the system.[10] The Court hypothesized that the benefits of the Cerritos system could have been achieved without the cross-ownership waiver if it were possible for GTECA to hire someone other than an affiliate of the cable programming provider for this construction project.[11]

6. On remand, the Commission found that it was not necessary for GTECA to hire Robak to build the cable network, and, therefore, rescinded GTECA's cross-ownership waiver and Section 214 authorization.[12] The Commission declined to order GTECA to divest its Cerritos facilities. Rather, the Commission "simply direct[ed] GTECA to take steps necessary to achieve compliance with the telephone company/cable television cross-ownership restriction."[13] The Commission also required GTECA to explain how it planned to comply with the Commission's cable-telephone cross-ownership requirements.[14]

7. GTECA filed a petition for stay of the Remand Order, and the Commission denied GTECA's request.[15] On January 5, 1994, the Court of Appeals for the Ninth Circuit stayed the effectiveness of the Remand Order pending judicial review.[16]

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[9] General Telephone Company of California, 4 FCC Rcd 5693, 5700-01 (paras. 50-61) (1989) (Waiver Review Order).

[10] National Cable Television Ass'n v. FCC, 914 F 2d 285, 288-89 (D.C. Cir. 1990) (NCTA v. FCC).

[11] NCTA v. FCC, 914 F.2d at 288-90.

[12] General Telephone Company of California, 8 FCC Rcd 8178, 8181 (para. 13) (1993) (Remand Order).

[13] Id. at 8182 (paras. 16-17).

[14] Id.

[15] General Telephone Company of California, 8 FCC Rcd 8753 (1993) (Stay Order).

[16] See Transmittal 873 D&J at 3; MCI Petition at 5; NCTA Petition at 2; City Petition at 12.

III. TARIFF FILINGS

8. Through Transmittal 873, GTECA proposes to convert the contractual arrangement with Apollo, established pursuant to the cross-ownership waiver in 1989, to a tariffed common carrier service which it calls video channel service.[17] GTECA contemplates that Apollo would use this tariffed service to continue to provide cable service to Apollo subscribers. In Transmittal 874, GTECA proposes to provide channel service to its affiliate, Service Corp., which would permit it to continue to provide video-on-demand service to subscribers in Cerritos. Video channel service would provide transmission of cable television signals from Apollo's and Service Corp.'s locations to subscribers' homes. Under both Transmittals 873 and 874, GTECA plans to charge $81,764 per month for this service.[18] In Transmittal 874, GTECA states that the rates, terms, and conditions governing the provision of video channel service to Service Corp. are identical to those set forth in Transmittal 873 under which service will be furnished to Apollo.[19] GTECA notes that, in 1992, Apollo prepaid its monthly payment obligations under the contract for the remainder of the 15 year contract term. Thus, GTECA concludes that if Transmittal 873 takes effect, Apollo will have already prepaid for video transmission service through May 2, 2006.[20]

9. MCI and Apollo argue that both Transmittals 873 and 874 should be rejected, while NCTA petitions against only Transmittal 874. The City of Cerritos requests that we suspend and investigate both transmittals. The City also requests that we extend GTECA's waiver of the cable-telephone cross-ownership rules, granted in 1989 for five years, in order to avoid disruption of cable service.[21]

IV. DISCUSSION

A. Need for Section 214 Authorization

10. Pleadings. Section 214 of the Communications Act, 47 U.S.C. § 214, requires all carriers to obtain authorization from the Commission prior to constructing or extending any line or engaging in transmission over any such new or extended line. MCI maintains that Transmittals 873 and 874 must be rejected because after the waiver expires on July 17, 1994,

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[17] Transmittal 873 D&J at 4.

[18] Id. at 8.

[19] Transmittal 874 D&J at 1.

[20] Id. at 8-9.

[21] City Petition at 3-4, 15-16.

GTECA will no longer have Section 214 authorization to operate its Cerritos system.[22] GTECA contends that its Section 214 authority was not limited to five years, but rather that only its waiver was.[23] GTECA also contends that the stay of the Remand Order was intended to maintain the status quo pending judicial review, so that the Section 214 authorization would remain in effect while the stay is in effect.[24]

11. Discussion. We reject GTECA's argument that its Section 214 authority does not expire on July 17. GTECA explicitly concedes that the waiver of the telephone-cable cross-ownership rule granted to GTECA in 1989 expires, by its terms, on July 17. Moreover, the Section 214 authority granted to GTECA was expressly conditioned on the issuance of the waiver.[25] Because the Commission's rules bar GTECA from operating its Cerritos system in the absence of a waiver, we conclude that GTECA's Section 214 authority will also expire on July 17.

12. We also have significant doubts about GTECA's claim that the Ninth Circuit's stay of the Remand Order in effect continues GTECA's Section 214 authority to operate the Cerritos facilities during the pendency of that review proceeding. We are, however, unable to determine the legal status of the Section 214 authority based on the current record. Therefore, we make no finding in this Order as to the effect of the Court's stay on the expiration of GTECA's Section 214 authority. On our own motion, we grant GTECA an interim Section 214 authorization to permit GTECA to provide video channel service while we consider this issue further in the context of our investigation of Transmittal 873. We also grant interim Section 214 authority for 60 days to provide service to Service Corp. under Transmittal 874 to give GTE time to bring itself into compliance with the telephone-cable cross-ownership rule. GTECA is directed by this Order, and other parties participating in this tariff proceeding are invited, to submit briefs to the Commission addressing this issue further.

B. Transmittal 874: Service to GTECA Affiliate

13. Pleadings. MCI and NCTA argue that Transmittal 874 must be rejected because it would violate the bar against telephone-cable cross-ownership established in the Cable Act of

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[22] MCI Petition at 6-7.

[23] Id. at 8.

[24] GTECA Opposition at 9.

[25] Waiver Review Order, 4 FCC Rcd at 5700 (para. 50) ("The grant of a waiver for good cause permits us to grant the Section 214 coaxial cable and fiber optic cable applications for General's Cerritos project.").

1984.[26] MCI argues that, because Service Corp.'s video programming tests are almost complete, the justification GTECA relied on originally to obtain the waiver no longer exists.[27]

14. In reply, GTECA does not dispute MCI's assertion that the programming and technical tests have almost been completed. Instead, GTECA argues that the Commission has no authority under the Cable Act of 1984 to reject Transmittal 874, because such action would unlawfully restrict GTECA's exercise of its First Amendment rights.[28] GTECA also asserts that the Commission argued in its brief in NCTA v. FCC that Service Corp. is not a "cable operator" and does not provide "cable service" within the meaning of the Cable Act of 1984.[29]

15. The City of Cerritos asks the Commission to extend the cross-ownership waiver and require GTECA to continue offering service to maintain the status quo. Alternatively, if the waiver is not extended, the City advocates suspension and investigation rather than rejection of Transmittal 874. The City asserts that these actions are necessary to prevent disruption of cable service to customers in Cerritos.[30]

16. Discussion. Transmittal 874 by its terms expressly provides transmission service to an affiliate of GTECA for the delivery of video programming. "Video programming" is defined in the Communications Act as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."[31] Neither GTECA nor any other party has contended that the movies shown through Service Corp.'s near-video-on-demand service should not be "generally considered comparable" to movies shown by television broadcast stations. This near-video-on-demand service is video programming within the meaning of the Communications Act. The involvement of Service Corp., an affiliate of GTECA, with the provision of video programming violates Sections 63.54 and 63.55 of the Commission's Rules, 47 C.F.R. § 63.54, 63.55, and Section 533(b) of the Communications Act, 47 U.S.C. § 613(b), absent a waiver. As previously indicated, after July 17, 1994, GTECA's waiver of

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[26] MCI Petition at 4-6. NCTA Petition at 3-4. See 47 U.S.C. § 533(b)(1); 47 C.F.R. § 63.54.

[27] MCI Petition at 6, citing Telecommunications Reports, 36-37 (Apr. 4, 1994).

[28] GTECA Opposition at 3-6, citing C&P v. United States, 830 F.Supp. 909 (E.D. Va. 1993), appeal pending No. 93-2340 (4th Cir.) (C&P). This appeal has been stayed while Congress considers whether to adopt legislation in this area. Chesapeake and Potomac Telephone Company v. United States, Docket No. 93-2340(L) (CA-92-1751-A), (4th Cir., June 15, 1994).

[29] GTECA Opposition at 7 n.11.

[30] City Petition at 26-28.

[31] Section 522(19) of the Communications Act, 47 U.S.C. § 602(19).

Sections 63.54 and 63.55 of the Commission's Rules will expire by its terms. We therefore conclude that Transmittal 874 is patently unlawful on its face and must be rejected.

17. We reject GTECA's reliance on the C&P case for the proposition that the cross-ownership rule is unconstitutional. In C&P, the Federal District Court for the Eastern District of Virginia concluded that the cross-ownership rules are an unreasonable restriction on the speech of communications common carriers, and thus violate the First Amendment.[32] The Commission found in the Remand Order, however, that the C&P case did not limit the Commission's ability to rescind the waiver in this case.[33] Moreover, the Commission has previously stated that the cross-ownership rule is consistent with the First Amendment to the Constitution.[34] GTECA has provided no grounds for the Commission to revisit that determination here.

18. The Commission concluded in the Remand Order in November 1993 that GTECA would have to take some action to comply with the cross-ownership rules.[35] GTECA has been on notice since the original grant of the cross-ownership waiver in 1989 that this waiver will expire on July 17, 1994.[36] Neither GTECA nor Service Corp. has made arrangements to ensure the continuation of video programming service to its Cerritos subscribers upon expiration of the waiver. Nevertheless, in order to avoid an abrupt interruption of service to customers of Service Corp., we offer GTOC an opportunity to come into compliance with the Cable Act of 1984. To accomplish this result, we grant a limited waiver of the cross-ownership waiver and Section 214 authorization for a period of 60 days after the release date of this Order. During this period, Service Corp. must either find an independent third party to provide the video programming services now provided by Service Corp. or notify its customers that it has decided to terminate providing video programming services. In order to provide an orderly transition for customers, GTECA must notify each subscriber that can receive its video programming service of the action it will take to bring itself into compliance with the Act, and to provide each subscriber a copy of this Order upon request. We require GTECA to submit a copy of its proposed notification for our review and approval prior to giving the notice to its customers.

19. The City of Cerritos has asked us to extend GTECA's waiver while any investigation

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[32] C&P, 830 F.Supp. at 926-31.

[33] Remand Order, 8 FCC Rcd at 8178 n.3. See also Stay Order, 8 FCC Rcd at 8754 n.12.

[34] Stay Order, 8 FCC Rcd at 8754 (para. 8).

[35] Remand Order, 8 FCC Rcd at 8182 (paras. 15-17).

[36] Waiver Review Order, 4 FCC Rcd at 5700 (para. 52).